In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 171

DANIEL MURPHY AND ALBERT MENDES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 374 F. 2d 651.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1967. A petition for rehearing was denied on March 30, 1967 (Pet. App. C). On April 25, 1967, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including May 20, 1967. The petition was filed on May 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

388-437—67

QUESTION PRESENTED

Whether petitioners' convictions should have been reversed because of improper summation by government counsel.

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act of 1947 (29 U.S.C. 186) provides in part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
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> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (4) To any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in re-

spect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * * * * *

(d) any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

STATEMENT

Petitioners were charged in the United States District Court for the Southern District of New York with having received payments of money from steel and iron construction businesses employing union members whom petitioners represented, in violation of 29 U.S.C. 186. Petitioners were convicted after a jury trial and each was sentenced to imprisonment for one year. The court of appeals affirmed.

The indictment charged, and the government's proof established, that on seventeen different occasions between 1960 and 1964 four separate employers gave either petitioner Murphy or petitioner Mendes or both of them sums of money ranging from $25 to $1000. The four employers, who had been granted immunity from prosecution by the Department of Labor, testified that the payments—in almost all instances made during the Christmas season—were represented as being gifts for petitioners or "[s]omething

for the boys, the needy boys" (App. 11a–12a, 31a, 48a, 60a).[1] The sums were in cash enclosed in envelopes which were personally delivered to petitioners in various offices (and in one instance an automobile) by the employers or their personal messenger (App. 10a, 26a, 32a–33a, 48a, 60a).

Petitioners, in addition to calling character witnesses, took the stand to deny having received money from the government witnesses or any employers.

ARGUMENT

The sole issue here is whether petitioners were so prejudiced by comments of government counsel that there must be a new trial. On the basis of the record, the summation read as a whole and the trial court's instructions, the court below properly affirmed petitioners' conviction; there is no occasion for further review.

1. Government counsel said in part (App. 98a–99a):

> Now, that cross examination of Mr. Kove's was very interesting because it leads to another question. Mr. Kove said, "Well, who else did you give money to?" And he said, "I gave everyone else liquor, but I gave these union officials money, cash."
>
> Well, why were these union officials treated differently from the other people who got liquor? Or, to state the question another way, "Why—why were these so-called Christmas payments made?"

[1] "App." references are to Appellant's Appendix in the court of appeals.

A Christmas payment is usually $5, a bottle of liquor, $10. These really weren't Christmas payments. They took the form of Christmas payments, but they were something else. Here we are talking about roughly $5,000 for a four-year period from four employers. And how many other employers did these union officials represent?

* * * * *

Why did these employers make these payments? That is the important question. Well, you have to understand the industry. And you heard it from all the witnesses. Murphy admitted to it. Nash talked about it. Other witnesses talked about it. When you need men, you call up the union hall and the union hall sends these men to these various construction jobs. Now, it is quite obvious. You have some good workers in that union hall and there are some very bad ones. And if you look at the contracts, you will see that the wage rate for the iron workers belonging to Local 580 are roughly $4 or $5 an hour.

Now, no employer, businessman, who is trying to make money can afford to pay $4 or $5 an hour to an incompetent. He needs a good man. He doesn't want to antagonize these two people because these people can give him a very rough time in their business. These witnesses for the government are businessmen. They want to make money, like you want to make money. You are businessmen also. And that brings up another point.

These two men are still union officials. These employers have no stake whatsoever in antagonizing these two people. These two people

have the power to send these employers poor workers day after day.

Petitioners strain to interpret these remarks as an attempt to inject the crime of extortion into the case. As noted by the court of appeals, the jury was required to choose between the testimony of the employers that they paid money to petitioners and petitioners' testimony that they received no money from any employer. And on this crucial issue of credibility it was relevant and important to show that the employers could well have had a motive to make the payments they said they made. See 1 Wharton's *Criminal Evidence* (12 ed.) § 159, p. 306; cf. *United States* v. *Annunziato*, 293 F. 2d 373 (C.A. 2), certiorari denied, 368 U.S. 919. That petitioners, as union officials, in fact had the power to influence the efficiency of the employers' business operations by sending them good or bad workers is supported by trial testimony (see App. 28a, 30a, 38a, 57a–58a, 68a–69a, 82a–86a).

Government counsel's rhetorical inquiry—"And how many other employers did those union officials represent?"—may, as the court of appeals said, have been unfortunate, but any prejudice occasioned thereby was cured by the immediate remark and instruction of the court that any other payments were not in the case—that the jury could concern itself only with the 17-odd crimes described in the indictment (App. 99a)—and by the subsequent instruction that the jury must rely exclusively on the testimony and exhibits (App. 105a).

2. Nor is there merit to petitioner's argument that the summation unfairly aligned the prestige of the

government against them. Government counsel argued (App. 100a):

> The immunity which was granted to these witnesses was granted by the Department of Labor. Now, the Department of Labor isn't going to grant immunity if no crimes have been committed. And the immunity relates to the testimony that the witnesses give * * *.
>
> * * * * *
>
> And think about this for a minute. Say you haven't committed a crime. What would be the sense of taking immunity if you hadn't committed a crime? If you hadn't committed a crime, you have nothing to worry about. But if you have committed a crime, you need immunity. But once having immunity—well, if you haven't committed a crime, you have nothing to worry about and you are certainly not going to get immunity so that you can walk into court commit perjury, which is a serious crime.
>
> So I think the fact that each of these people received immunity shows that they did this crime, that these defendants received the moneys which the government witnesses admitted to.

In the circumstances, the court of appeals was justified in finding that these remarks of government counsel did not vitiate the convictions. The credibility of the government's employer witnesses had been sharply challenged, and the remarks in question were directed at rehabilitating them. Furthermore, no objection was made to these remarks and no exception taken to the court's instruction (App. 110a) on the significance of the witnesses' receipt of immunity.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

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